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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* DAVID LOUIS KAMINSKY and DAVID M. OGLE

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Appeal 2009-007281  
Application 10/635,598<sup>1</sup>  
Technology Center 2400

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Before HOWARD B. BLANKENSHIP, JEAN R. HOMERE, and  
CAROLYN D. THOMAS, *Administrative Patent Judges*.

HOMERE, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>2</sup>

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<sup>1</sup> Filed on August 6, 2003. The real party in interest is International Business Machines Corp. (App. Br. 1.)

<sup>2</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

## I. STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) (2002) from the Examiner's final rejection of claims 1 through 24. (App. Br. 2.)<sup>3</sup> We have jurisdiction under 35 U.S.C. § 6(b) (2008).

We affirm.

### *Appellants' Invention*

Appellants invented a system, method, and machine readable storage for detecting e-mail delivery impairments in an e-mail delivery system. (Spec. 4, ¶ [0001], [0008].)

### *Illustrative Claim*

Independent claim 1 further illustrates the invention as follows:

1. An intelligent electronic mail (e-mail) gateway comprising:

a message store configured to store received messages forwarded by senders over a network to a mail server coupled to the e-mail gateway and associated with corresponding intended recipients; and,

a notification manager coupled both to the gateway and said message store, said manager having a configuration for notifying selected ones of said senders when delivery to said intended recipients has become impaired.

### *Prior Art Relied Upon*

The Examiner relies on the following prior art as evidence of unpatentability:

Horvitz	US 2002/0087649 A1	Jul. 4, 2002
Tomkow	US 2002/0144154 A1	Oct. 3, 2002
(hereinafter "Tomkow II")		

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<sup>3</sup> All references to the Appeal Brief are to the Appeal Brief filed on August 8, 2008, which replaced the prior Appeal Brief filed on August 30, 2007.

Tomkow	US 2006/0112165 A9	May 25, 2006
(hereinafter “Tomkow I”)		(filed on Mar. 8, 2002)
Delaney	US 2006/0177021 A1	Aug. 10, 2006
		(filed on Jan. 19, 2006)

*Rejections on Appeal<sup>4</sup>*

The Examiner rejects the claims on appeal as follows:

Claims 1 through 4 stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

Claims 1, 4 through 6, 9, 15, 16, and 19 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Tomkow I.

Claims 2, 12 through 14, and 22 through 24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Tomkow I and Horvitz.

Claims 7, 8, 17, and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Tomkow I and Delaney.

Claims 3, 10, 11, 20, and 21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Tomkow I and Tomkow II.

*Appellants’ Contentions*

1. Appellants contend that independent claim 1 is directed to statutory subject matter because the present Specification indicates that the claimed invention can be realized in a centralized fashion in one computer system, or in a distributed fashion where different elements are spread out

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<sup>4</sup>The Examiner objects to Appellants' Specification for failing to provide proper antecedent basis for the “machine readable storage” recited in independent claim 15 and dependent claims 16 through 24. (Ans. 3-4.) Appellants correctly acknowledge that this is not an appealable issue. (App. Br. 5.) Since the Examiner's objection to Appellants' Specification is a petitionable matter as opposed to an appealable one, this issue is not properly brought before us. *See* 37 C.F.R. 1.181.

across several interconnected computer systems. (App Br. 5-6.) Appellants also argue that independent claim 1 cannot be construed as software *per se* because Appellants' figure 1 clearly depicts that the both the notification manager and the message store are integrally tied into the mail gateway and, therefore, amount to a computing device. (Reply Br. 4-5.)

2. Appellants contend that Tomkow I discloses an RPost server (16) that is only associated with a single intended recipient and, therefore, does not teach associating the claimed "mail server" with multiple intended recipients, as recited in independent claim 1. (App. Br. 10; Reply Br. 7.) Further, Appellants argue that Tomkow I's disclosure of the content of a receipt fails to teach a message store, let alone a message store associated with intended recipients. (Reply Br. 6-7.) Additionally, Appellants contend that Tomkow I's disclosure of Mail User Agent (hereinafter "MUA") notifications does not teach "notifying ones of said senders when delivery to said intended recipients has become impaired," as recited in independent claim 1. (App. Br. 10.) Moreover, Appellants allege that Tomkow I fails to teach how *selected ones of the senders* are notified when delivery of the e-mail becomes impaired, as claimed. (Reply Br. 7-8.) (Emphasis added.)

#### *Examiner's Findings and Conclusions*

1. The Examiner finds that independent claim 1 is directed to non-statutory subject matter because the claimed "intelligent e-mail gateway" and corresponding "message store" and "notification manager" can be construed as software *per se*. (Ans. 9-10.)

2. The Examiner finds that Tomkow I's discloses a first RPost server (16) coupled to a second RPost server (14) and, therefore, teaches a mail server coupled to an e-mail gateway, as recited in independent claim 1.

(*Id.* at 10.) Further, the Examiner finds that Tomkow I's disclosure of a plurality of recipients who receive messages, in conjunction with a plurality of senders who send messages, teaches that the claimed system is not limited to only a single recipient and sender. (*Id.* at 11.) Additionally, the Examiner finds that Tomkow I discloses that RPost server (14) is capable of storing messages forwarded by senders and, therefore, teaches the claimed "message store." (*Id.*) The Examiner also finds Tomkow I's RPost server (14) both notifies the sender when delivery of a message to a recipient has failed, and collaborates with the RPost server (16) to deliver messages to recipients. (*Id.* at 11-12.) Therefore, the Examiner finds that Tomkow I's RPost server (14) teaches the claimed "notification manager." (*Id.*)

## II. ISSUES

1. Have Appellants shown that the Examiner erred in finding that independent claim 1 is directed to non-statutory subject matter? In particular, the issue turns on whether the claimed "intelligent e-mail gateway" and corresponding "message store" and "notification manager" can be construed as software *per se*.

2. Have Appellants shown that the Examiner erred in finding that Tomkow I anticipates independent claim 1? In particular, the issue turns on whether Tomkow I teaches the following claim limitations:

(a) "a mail server coupled to the e-mail gateway and associated with corresponding intended recipients," as recited in independent claim 1; and

(b) “a notification manager...having a configuration for notifying selected ones of said senders when delivery to said intended recipients has become impaired,” as recited in independent claim 1.

### III. FINDINGS OF FACT

The following Findings of Fact (hereinafter “FF”) are shown by a preponderance of the evidence.

#### *Appellants’ Specification*

FF 1. Appellants’ figure 1 depicts that the mail gateway (140), which may be a formalized computing device, includes a message store such as a list or a queue (180) for storing received e-mail messages (190). (Spec. 8, ¶ [0018].)

#### *Tomkow I*

FF 2. Tomkow I discloses verifying delivery and integrity of electronic messages by providing information from a first party pertaining to a second party, and for allowing the first party to transmit such information to a third party on a secure basis. (1: ¶ [0001].)

FF 3. Tomkow I discloses that the RPost server (14) stores a copy of the original message and the corresponding attachments for later retrieval before transmission to the recipient’s Mail Transport Agent (hereinafter “MTA”). (5: ¶ [0079]-[0081].)

FF 4. Tomkow I utilizes RP servers (14 & 16) and MTAs interchangeably. (Fig. 1 & 3; *see also* 4: ¶ [0049].)

FF 5. Tomkow I discloses identifying the sender of a message to which returned MUA notifications refer, such that the notification

information can be passed to the sender in the form of a receipt. (6: ¶ [0097].)

FF 6. Tomkow I discloses that a receipt is an e-mail sent to the original sender of a made-of-record message. (9: ¶ [0147].) Tomkow I discloses that a receipt includes an identifier, that data and time at which the receipt was generated, the quoted body of the original message together with the e-mail addresses of its intended recipients, the date and time at which the RPost server received the message, and a table for each destination listing (i.e., FAILED, UDELIVERABLE, DELIVERED, DELIVERED-AND-WAITING, or DELIVERED-TO-MAILBOX). (9-10: ¶ [0148]-[0157].) Tomkow I discloses that the purpose of a receipt is “to accurately apprise the reader of the form of verification of delivery the system has been able to achieve.” (10: ¶ [0158].)

*Horvitz*

FF 7. Horvitz generally relates to computer systems and, in particular, to minimizing the disruption caused by notifications from various communications modules via bounded deferral policies associated with notification platform architecture. (1: ¶ [0002].)

FF 8. Horvitz discloses a notification or alerting system that estimates when a user is expected to return, such that it transmits priority e-mails before the user returns. (14-15: ¶ [0268].) In particular, Horvitz discloses automatically notifying the senders of highly urgent messages when a recipient is expected to return. (*Id.*) Horvitz discloses that message senders receive feedback when a user is expected to return, such that he or she can reply to the messages. (*Id.*)



FF 9. Horvitz's figure 24 depicts a routing system (420) that serves as a forwarding mechanism by forwarding a prioritized text to a different e-mail address. (15-16: ¶ [0277].) Horvitz discloses that the forwarding mechanism may be useful when a user has e-mail access to a different e-mail address and desires to be kept informed of high priority e-mails at the alternative address. (*Id.*)

*Delaney*

FF 10. Delaney generally relates to communication services and, in particular, to delivery of messages to selected recipients through one or more communication modes. (1: ¶ [0002].)

FF 11. Before transmitting a message, Delaney discloses that a transaction server checks for recipient restrictions, such as blocking messages during specified times, in both the message sender's data records and the recipient's data records. (6: ¶ [0058].)

IV. ANALYSIS

*35 U.S.C. § 101 Rejection*

*Claim 1*

Independent claim 1 recites, in relevant part, "intelligent e-mail gateway" and corresponding "message store" and "notification manager."

As detailed in the Findings of Fact section above, Appellants' Specification discloses that the mail gateway, which may be a computing device, includes a message store for storing received e-mails. (FF 1.) We find that the claimed "message store" entails the use of memory in a computing device programmed or configured to store received e-mails. Consequently, we find that the claimed "intelligent e-mail gateway" and

corresponding “message store” amounts to a machine<sup>5</sup> and, therefore, cannot be reasonably construed as software *per se*. It follows that Appellants have shown that the Examiner erred in rejecting independent claim 1 as being directed to non-statutory subject matter.

*Claims 2 through 4*

Since dependent claims 2 through 4 also incorporate the claimed “message store,” we find that that these claims are also directed to statutory subject matter for the reasons set forth in our discussion of independent claim 1.

*35 U.S.C. § 102(e) Rejection—Tomkow I*

*Claim 1*

Independent claim 1 recites, in relevant part:

1) a mail server coupled to the e-mail gateway and associated with corresponding intended recipients; and 2) a notification manager...having a configuration for notifying selected ones of said senders when delivery to said intended recipients has become impaired.

As detailed in the Findings of Fact section above, Tomkow I discloses a system that verifies the delivery and the integrity of e-mails. (FF 2.) In particular, Tomkow I discloses an RPost server associated with a sender that stores a copy of an original e-mail and its corresponding attachments before transmission to an MTA, or RPost server associated with a recipient. (FFs 3

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<sup>5</sup> “A machine is a concrete thing, consisting of parts, or of certain devices and combination of devices. This includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.” *In re Ferguson*, 558 F.3d 1359, 1364 (quoting *In re Nuijten*, 500 F.3d 1346, 1355 (Fed. Cir. 2007), *reh'g denied en banc*, 515 F.3d 1361 (Fed. Cir. 2008), and *cert. denied*, 129 S. Ct. 70 (2008)).

& 4.) Further, Tomkow I discloses a notification in the form of a receipt that includes e-mail addresses pertaining to intended recipients. (FF 6.)

We find that Tomkow I's disclosure teaches a first RPost server that is capable of receiving and storing e-mails designated for intended recipients prior to sending such e-mails to a second RPost server. In particular, we find that Tomkow I's first RPost server amounts to a gateway because it receives and stores e-mails prior to their receipt in the second RPost server. Moreover, while figures 1 and 3 of Tomkow I depict that the second RPost server is associated with one intended recipient of an e-mail, we find that the depicted sender-recipient pair is merely illustrative of the basic scheme for a typical e-mail communication between a sender and a recipient. We therefore do not agree with Appellants' attempt to restrict the cited illustration to a single dedicated sender-recipient pair. Rather, we find that the second RPost server is intended to be associated with multiple sender-recipient pairs. Consequently, since the second RPost server is coupled to the first RPost server and is capable of being associated with multiple sender-recipient pairs, we find that Tomkow I teaches "a mail server coupled to the e-mail gateway and associated with corresponding intended recipients," as recited in independent claim 1.

Next, Tomkow I discloses identifying the sender of an e-mail to which a returned MUA notification refers. (FF 5.) Tomkow I discloses passing such notification information to the sender in the form of a receipt. (*Id.*) Further, Tomkow I's discloses that a receipt contains the delivery status of an e-mail, which includes "FAILED," "UNDELIVERABLE," and "DELIVERED-TO-MAILBOX." (FF 6.)

Upon utilizing returned MUA notifications to determine the senders of respective e-mails, we find that the first RPost server passes the corresponding notification information to each sender as a receipt. We also find that Tomkow I's disclosure teaches that a receipt notifies the senders of respective e-mails whether delivery of an e-mail has failed, or the e-mail is undeliverable. Since the claimed "selected ones of said senders" encompasses all senders, we find that Tomkow I's first RPost server is capable of utilizing returned MUA notifications in order to notify senders of respective e-mails that deliver of an e-mail has failed, or the e-mail is undeliverable. Thus, we find that Tomkow I teaches "a notification manager...having a configuration for notifying selected ones of said senders when delivery to said intended recipients has become impaired," as recited in independent claim 1.

Alternatively, we note that the disputed claim limitation only requires "a notification manager...*having a configuration* for notifying selected ones of said senders...". (Claims App'x) (emphasis added.) We find that this recitation merely requires that the notification manager be capable of performing the recited function of notifying selected senders when delivery of an e-mail has become impaired. Such recitation does not require, however, that the notification manager actually perform the recited function of notifying selected senders when delivery of an e-mail has become impaired. This recitation is a statement of intended use, which is fully met by a prior art structure that is capable of performing the recited function. A statement of intended use in an apparatus claim cannot distinguish over a prior art apparatus that discloses all the recited limitations and is capable of performing the recited function. *See In re Schreiber*, 128 F.3d 1473, 1477

(Fed. Cir. 1997). We note that “[a]n intended use or purpose usually will not limit the scope of the claim because such statements usually do no more than define a context in which the invention operates.” *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1345 (Fed. Cir. 2003). Although “[s]uch statements often ... appear in the claim's preamble,” *In re Stencel*, 828 F.2d 751, 754 (Fed. Cir. 1987), a statement of intended use or purpose can appear elsewhere in a claim. *Id.* We are therefore satisfied that the Tomkow I teaches an equivalent structure that is capable utilizing a notification manager to perform the recited function of notifying selected senders when delivery of an e-mail has become impaired. (FFs 3-6.) It follows that Appellants have not shown that the Examiner erred in finding that Tomkow I anticipates independent claim 1.

*Claims 4 through 6, 9, 15, 16, and 19*

Appellants do not provide separate arguments for patentability with respect to independent claims 5 and 15, and dependent claims 4, 6, 9, 16, and 19. Therefore, we select independent claim 1 as representative of the cited claims. Consequently, Appellants have not shown error in the Examiner's rejection of independent claims 5 and 15, and dependent claims 4, 6, 9, 16, and 19, for the reasons set forth in our discussion of independent claim 1. *See* 37 C.F.R. § 41.37(c)(1)(vii).

*35 U.S.C. § 103(a) Rejection—Combination of Tomkow I and Horvitz  
Claim 2*

Appellants contend that Horvitz's disclosure of a routing system that can route text to a different e-mail address does not teach or fairly suggest

“an alternate e-mail address with which said selected ones of said senders can retransmit said messages to corresponding intended recipients,” as recited in dependent claim 2. (App. Br. 12; Reply Br. 8-9.) We do not agree.

As set forth in the Findings of Fact section above, Horvitz discloses minimizing the disruption caused by notifications from various communications modules. (FF 7.) In particular, Horvitz discloses a routing system that forwards a prioritized text to a different e-mail address. (FF 9.) Horvitz discloses that the forwarding mechanism is useful when a recipient of an e-mail has access to a different e-mail address and desires to be kept informed of high priority e-mails at the alternative e-mail address. (*Id.*)

We find that Horvitz’s disclosure teaches that a sender of an e-mail can utilize a different or alternative e-mail address for an intended recipient in order to forward or re-transmit the e-mail to the recipient. Accordingly, when delivery of an e-mail has failed at an intended recipient’s first e-mail address, we find that an ordinarily skilled artisan would have appreciated substituting or replacing the first e-mail address with Horvitz’s different or alternative e-mail address. Thus, we find that Horvitz teaches or fairly suggests the disputed limitation. It follows that Appellants have not shown that the Examiner erred in concluding that the combination of Tomkow I and Horvitz renders dependent claim 2 unpatentable.

### *Claim 12*

Appellants contend that Tomkow I’s disclosure of indicating that delivery of an e-mail has failed does not teach or fairly suggest “formatting a

detailed notification describing the nature of the impairment,” as recited in dependent claim 12. (App. Br. 12; Reply Br. 9.) We do not agree.

As set forth above, we find that Tomkow I’s disclosure teaches passing a notification to a sender of an e-mail in the form of a receipt. Moreover, Tomkow I discloses that a receipt includes an identifier, that data and time at which the receipt was generated, the quoted body of the original message together with the e-mail addresses of its intended recipients, the date and time at which the RPost server received the message, and a table for each destination listing (i.e., FAILED or UNDELIVERABLE). (FF 6.) Further, Tomkow I discloses that a receipt verifies the delivery status of a respective e-mail. (*Id.*)

We find that the contents of the disclosed receipt amount to a detailed notification, including information describing that the delivery of an e-mail has failed, or that the e-mail is undeliverable. Thus, we find that Tomkow I teaches or fairly suggests the disputed limitation. It follows that Appellants have not shown that the Examiner erred in concluding that the combination of Tomkow I and Horvitz renders dependent claim 12 unpatentable.

#### *Claims 14, 22, and 24*

Appellants do not provide separate arguments for patentability with respect to dependent claims 14, 22, and 24. Therefore, we select dependent claim 12 as representative of the cited claims. Consequently, Appellants have not shown error in the Examiner’s rejection of dependent claims 14, 22, and 24 for the reasons set forth in our discussion of dependent claim 12. *See* 37 C.F.R. § 41.37(c)(1)(vii).

*Claim 13*

Appellants contend that Horvitz's disclosure of estimating when a user is expected to return does not teach or fairly suggest "an estimate of when normal mail delivery service can resume," as recited in dependent claim 13. (Reply Br. 10-11.) We do not agree.

As detailed in the Findings of Fact section above, Horvitz discloses a notification or alerting system that estimates when a user is expected to return. (FF 8.) In particular, Horvitz discloses automatically conveying to the senders of highly urgent messages when a recipient is expected to return, such that he or she can reply to the messages. (*Id.*) We find that an ordinarily skilled artisan would have appreciated that Horvitz's disclosure of estimating when an intended recipient of an e-mail is expected to return and reply to the e-mail amounts to estimating when the normal exchange of e-mail between a sender and an intended recipient can resume. Thus, we find that Horvitz teaches or fairly suggests the disputed limitation. It follows that Appellants have not shown that the Examiner erred in concluding that he combination of Tomkow I and Horvitz renders dependent claim 13 unpatentable.

*Claim 23*

Appellants do not provide separate arguments for patentability with respect to dependent claim 23. Therefore, we select dependent claim 13 as representative of the cited claim. Consequently, Appellants have not shown error in the Examiner's rejection of dependent claim 23 for the reasons set forth in our discussion of dependent claim 13. *See* 37 C.F.R. § 41.37(c)(1)(vii).



*35 U.S.C. § 103(a) Rejection—Combination of Tomkow I and Delaney  
Claims 7, 8, 17, and 18*

Appellants contend that Delaney's disclosure of a recipient's schedule, or state information, amounts to information pertaining to customers. (App. Br. 13; Reply Br. 12.) Therefore, Appellants argue that Delaney does not teach or fairly suggest "consulting a data store of state information for selected ones of said respective mail servers to recall an already identified impairment," as recited in dependent claim 7. (*Id.*) We do not agree.

As detailed in the Findings of Fact section above, Delaney discloses delivering messages to selected recipients through one or more communication nodes. (FF 10.) In particular, Delaney discloses that a transaction server checks both the data records for the sender and recipient of an e-mail for restrictions outlined by the recipient of the e-mail (i.e., blocking messages during specified times). (FF 11.) We find that Delaney's disclosure teaches consulting the data records of a transaction server in order to identify restrictions, such as blackout times for receiving an e-mail, outlined by an intended recipient of the e-mail. In particular, we find that an ordinarily skilled artisan would have appreciated that such blackout times for receiving an e-mail outlined by an intended recipient amount to a previously identified impairment associated with that recipient. Thus, we find that Delaney teaches or fairly suggests the disputed limitation. It follows that Appellants have not shown that the Examiner erred in concluding that the combination of Tomkow I and Delaney renders dependent claim 7 unpatentable.

Appellants do not provide separate arguments for patentability with respect to dependent claims 8, 17, and 18. Therefore, we select dependent claim 7 as representative of the cited claims. Consequently, Appellants have not shown error in the Examiner's rejection of dependent claims 8, 17, and 18 for the reasons set forth in our discussion of dependent claim 7. *See* 37 C.F.R. § 41.37(c)(1)(vii).

*35 U.S.C. § 103(a) Rejection—Combination of Tomkow I and Tomkow II  
Claims 3, 10, 11, 20, and 21*

Appellants offer the same arguments set forth in response to the obviousness rejection of independent claim 1 to rebut the obviousness rejection of dependent claims 3, 10, 11, 20, and 21. (App. Br. 13-14.) We have already addressed these arguments in our discussion of independent claim 1, and we found them unpersuasive. Consequently, Appellants have not shown that the Examiner erred in concluding that dependent claims 3, 10, 11, 20, and 21 are unpatentable over the combination of Tomkow I and Tomkow II.

## V. CONCLUSIONS OF LAW

1. Appellants have shown that the Examiner erred in rejecting claims 1 through 4 as being directed to non-statutory subject matter under 35 U.S.C. §101.

2. Appellants have not shown that the Examiner erred in rejecting claims 1, 4 through 6, 9, 15, 16, and 19 as being anticipated under 35 U.S.C. § 102(e).

3. Appellants have not shown that the Examiner erred in rejecting claims 2, 3, 7, 8, 10 through 14, 17, 18, and 20 through 24 as being unpatentable under 35 U.S.C. § 103(a).

## VI. DECISION

1. We reverse the Examiner's decision to reject claims 1 through 4 as being directed to non-statutory subject matter under 35 U.S.C. §101.

2. We affirm the Examiner's decision to reject claims 1 through 45 as being anticipated under 35 U.S.C. § 102(b).

3. We affirm the Examiner's decision to reject claims 2, 3, 7, 8, 10 through 14, 17, 18, and 20 through 24 as being unpatentable under 35 U.S.C. § 103(a).

Since we have affirmed at least one ground of rejection with respect to each claim on appeal, the Examiner's decision is affirmed. *See* 37 C.F.R. § 41.50(a)(1).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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